COMMENT.

The Maryland Court of Appeals has just handed down an opinion, in a case not yet reported, which is of very general interest in view of the current agitation for tax reform and the spread of Mr. Henry George's theory of the "single tax." The case arose out of the attempt of the Town of Hyattsville, Md., to make a practical application of the single tax theory. The town obtained from the Legislature in 1892 an amendment of its charter which provided that land and the improvements thereon should be separately assessed for the purposes of taxation but made no provision whatever for assessing personal property. The Town Commissioners were made a "Board of Appeal, Equalization and Control," who, on an appeal by an aggrieved tax-payer, were empowered to make "such deduction or exception from or addition to the assessment made by the assessors, as they may deem just, and to correct errors or illegal assessments," etc. Under this act the land and improvements were assessed separately and the personality not at all. Then, although no appeal had been taken by any tax-payer, the Commissioners, of their own motion, struck from the assessment roll the entire valuation on improvements and levied a tax of 25 cents on each $100 of the assessed value of the land. The matter was brought before the court on a petition for a *mandamus* to compel the Commissioners to restore the improvements to the assessment roll, to assess all personal property, and prohibit the collection of the taxes actually levied. The court held, in the first place, that the Commissioners had no right under the statute to strike from the roll the assessment on buildings and improvements, but that their powers were "strictly confined to a revision of the assessment previously made by the Assessors," and that "any other construction would not only lead to the greatest confusion, but would repudiate the long and well-settled doctrine that exemptions from taxation are never presumed and are only allowed when clearly and unequivocally granted."

The court, however, went further than this and declared the whole act under which the taxes were laid to be null and void as in conflict with a section of the "Declaration of Rights" in the State Constitution which provides that "every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government,

according to his actual worth in real and personal property; yet fines, duties or taxes may properly and justly be imposed or laid with a political view for the good government and benefit of the community." This principle that every kind of property should be alike subject to the burdens of taxation the court held to be a part of the organic law of Maryland, uniformly and consistently followed, and "eminently just in itself as a sound and long-accepted axiom of political economy." The "single tax" system is denounced as "an experimental if not visionary scheme, which, if suffered to obtain a foothold, will inevitably lead to ruinous results. * * * If the assessed valuations upon buildings and improvements and upon personal property be stricken from the assessment books and the taxes be levied only upon the owners of the land, the burden would speedily become insufferable and land would cease to be worth owning. Such a system would eventually destroy individual ownership in the soil, and, under the guise of taxation, would result in ultimate confiscation. The wisdom of providing in the organic law against such abuses is obvious, and the provision by which the people of the State are protected against them embodies a fundamental principle which underlies the American system of taxation." While this decision will doubtless not convince the advocates of the "single tax" that their theory is unsound and necessarily un-American, it does show the difficulties in the way of any such change in our system of taxation, which can only be accomplished by constitutional amendment in those States whose constitutions contain provisions similar to that of Maryland.

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When a negotiable instrument remains unpaid at maturity, and suit is brought for collection, it often happens that the attorney's fees cover almost the whole amount collected. It has therefore become the practice in some localities to insert in all promissory notes a stipulation that, if suit has to be brought for payment, the maker shall also pay collection expenses. What, then, is the effect of such a clause? We find various irreconcilable positions held in the different States. The courts of Louisiana, Arkansas, Indiana, Iowa, Kansas, and the United States Circuit Courts in Kansas and Oregon have fully upheld such stipulations as a part of the note. It has been held in Pennsylvania, Missouri, Wisconsin and Minnesota, that the stipulation may be enforced, but that it renders the instrument *non-negotiable*, in making the amount to be paid uncertain. Michigan and Kentucky go still farther, in considering it to be in the form of a penalty, and therefore to be

treated as mere surplusage. But the most radical position has been taken in Ohio and Nebraska, where the courts have held that such a stipulation is a mere cloak for *usury*, and therefore avoids the *whole transaction*. It seems difficult to perceive any justice in such a view; if the note is paid, as it ought to be, at maturity, the clause is of no effect; but if it is not, should the creditor be put to a loss and not be allowed compensation for expenses incurred solely through the debtor's fault? We find an analogy to this in the practice of inserting similar clauses in leases of real property. A recent case in North Carolina (*Tinsley* v. *Hoskins*, 16 S. E. Rep. 325), however, holds such a clause to be a form of usury; in the words of the court: "We are of the opinion that stipulations, like the one now sued upon, when incorporated into obligations of this particular character, are against public policy and therefore invalid." But the latest decision on this subject, *Dorsey* v. *Wolff*, 32 N. E. Rep. 495 (Ill.), is in conformity with what appears now to be the preponderance of authority, in holding such a provision as valid, and in no manner affecting the validity or negotiability of the instrument.

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The decision of Judge Gresham, in the case of *In re Interstate Commerce Commission*, 53 Fed. Rep. 476, marks an epoch in the history of governmental regulation of railroad management, in this country. It was here held that the clause in the Interstate Commerce Act empowering Circuit Courts to make orders enforcing subpœnas issued by the Interstate Commerce Commission, was unconstitutional, on the ground that the Commission was merely an administrative, not a judicial body, and since the jurisdiction of the United States Courts, under the Constitution, is purely a judicial one over certain specified cases or controversies and an application for aid in obtaining evidence from an administrative body not being such a "case" or "controversy" as is enumerated, nothing is brought before the court for adjudication and it has no power to act. The judicial department is distinct from the administrative and Congress cannot make it an instrument of any other department. The only remedy, therefore, in case of the refusal of a railroad to obey the orders of the Commission is by a regular prosecution, brought in the courts, as for any other violation of any other United States law. However desirable the restriction of the evils against which this act was aimed may be, it seems very evident that the decision of the Circuit Court in this case was in accordance with a true construction of the Constitution.

The Supreme Court of Pennsylvania has recently passed upon the novel question whether a land-owner, who has conveyed without reservation the coal lying under the surface, retains his title to oil, gas, and other substances beneath the coal, and if so, what are his rights of access. The court found little difficulty in reaching the conclusion that both the title and the right of access to the underlying *strata* remained in the grantor. But here began a divergence of opinion, a bare majority holding that the exercise and enforcement of the right of access were not for the judiciary but for the legislature to regulate; that a court of equity will listen to a petitioner and declare his rights but will not necessarily enforce them. The minority went further, and while not approving the application of the doctrine of a surface right of way of necessity to the facts of this case, as suggested by the court below, nevertheless, laid down the broad proposition that the several *strata* composing the earth's crust are, by virtue of their order and arrangement, subject to reciprocal servitudes. Right of access to a lower *stratum* is as much a servitude as is the right of support, or the right of a land-owner, as against the owner above him, to insist on the delivery of a stream of water to his land within its natural channel. As these servitudes are imposed by the laws of nature, the courts should and do recognize and enforce them, independent of all statutory enactments. This latter view, of the minority, certainly seems the more reasonable. *Chartiers Block Coal Co.* v. *Mellon*, 25 Atl. Rep. 597.

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In the noted trial of T. Thatcher Graves for the murder of Mrs. Barnaby, the lower court admitted evidence as part of the *res gestae* which was undoubtedly hearsay in its character and prejudicial in its effect upon the jury. It was largely on this account that the Supreme Court of Colorado recently granted a new trial (32 Pac. R. 63). A sample of the evidence so admitted is found in the testimony of one of the State's witnesses from which we quote: "The next morning she (Mrs. Barnaby) seemed a little brighter. She knew that she had taken poison at that time. I asked if she thought the Bennetts could have sent the stuff. She said, 'No.' I asked her, 'Do you think Dr. Graves could have sent it?' and she did not answer me." Other evidence of the same kind was admitted on the same ground. The rule against the admission of hearsay evidence is a wise and perhaps an absolutely necessary one, and courts cannot guard too carefully against evidence which bears that stamp, especially where a human life depends upon the outcome of a trial. This

leads us to further remark that the doctrine of *res gestae* is, or ought to be, one of very limited application. Courts seem sometimes to forget this and to stretch this doctrine far beyond its logical and natural bounds.

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In the case of *Hite* v. *Hite*, 20 S. W. Rep. 778, the Supreme Court of Kentucky was called upon to decide whether stock dividends were income and as such would go to a life tenant, or whether they were capital and as such would belong to the remainder man. The court very unhesitatingly decided that there was no reason in the nature of things why profits in the form of stock should not go to the life tenant. This is the Pennsylvania rule as laid down in *Earp's Appeal*, 28 Pa. State 368, while in *Gibbons* v. *Mahone*, 136 U. S. 549, the United States Supreme Court follows the English rule holding that stock dividends are capital. The addition of Kentucky to the States in which the doctrine of *Gibbons* v. *Mahone* is not considered law makes it seem altogether unlikely that a uniform rule on this point will soon be established in this country. We are not prepared to say which line of decisions seems to be based upon the better reasoning, but we do think that one rule would be more satisfactory than two. Let us have greater uniformity in the law. Such a thing is far from impossible and is highly desirable.

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Another decision has recently been added to the long list of those dealing with the troublesome question of interstate commerce. The case of *Harmon* v. *Chicago*, 29 N. E. 732 (Ill.), noted in Volume I. of this Journal (p. 172), has been reversed by the United States Supreme Court (13 Supreme Court Rep. 306). The question was as to the validity of an ordinance of the City of Chicago requiring the payment of a license fee on steam tugs which were enrolled and licensed in the coasting trade of the United States, under the provisions of the Revised Statutes, and which were actually engaged in towing vessels from Lake Michigan to the Chicago River. The Supreme Court of the United States held—and we think rightly held—that the ordinance was void as conflicting with the exclusive power of Congress to regulate interstate and foreign commerce, notwithstanding the fact that the city had from time to time expended money in deepening the river to make it more suitable for purposes of navigation.

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Dog law is peculiar and although largely dependent on statute, is always of general interest. In a recent New York case (*Quilty*

v. *Battie et al.*, 32 N. E. Rep. 47), the court held that a wife made herself liable to a person bitten by her husband's vicious dog. This at first sight is peculiar, but it appeared that the wife owned the premises where the dog was kept, and on which the unfortunate event occurred, and, as in New York the wife has the same property rights as if unmarried, the husband is not a proper party defendant in cases of trespass committed by her in the management of her estate. Such a dog is not a necessary equipment of a well-ordered household, and she should not only have used her moral influence, but should have gently and firmly insisted on her legal rights, and had the dog removed from the premises. Last year we commented on a Mississippi case, in which it was held that a police officer was justified in shooting a dog which had escaped to the street without fault of the owner, although the owner's wife was in pursuit, and the dog was doing no harm. In a recent Michigan case, however, it was held that a person was not justified in shooting a dog without notice to the owner, although the dog at the time was trespassing on his premises. Even this is not strange, but when it is considered that the aforesaid dog was in the habit of calling at night and barking loudly, had walked on a freshly painted porch, and by way of pleasing variety had frisked with the hens and chased cats into the trees, it would seem that even the most peaceful citizen would be likely to lose his temper and do something rash.

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The decision in the case of *People ex rel. Post* v. *Cross*, 32 N. E. Rep. 246, is in direct opposition to *ex parte* McKnight (28 N. E. Rep. 1034) noticed in Volume I. of the LAW JOURNAL, p. 134. It was here held, by the Supreme Court of Ohio, that a prisoner, extradited from another State for some particular offense, could not be tried for another crime, not mentioned in the requisition papers. In the case of Post, however, who was extradited from Wisconsin, on the charge of grand larceny and afterwards tried for robbery, the court held that the State was not thus restricted in interstate extradition, although the contrary was true whenever a foreign country was concerned. A decision on a mooted question from a tribunal of authority is always valuable, and in this case the New York opinion seems to have the weight of authority in its favor. See Wharton's Crim. Plead. and Prac., § 37, p. 27, with cases cited.